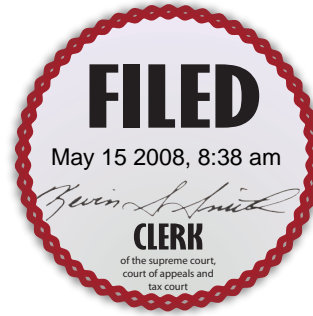


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BRIAN GOOLDY,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 53A01-0712-PC-575
)	
STATE OF INDIANA,)	
)	
Appellee-Respondent.)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Marc Kellams, Judge
Cause No. 53C02-0703-PC-246

May 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Sr. Judge

Brian Gooldy appeals the post-conviction court's denial of his pro se petition for post-conviction relief. Gooldy raises two issues, which we consolidate and restate as whether the post-conviction court erred by summarily denying his petition for post-conviction relief. We reverse and remand.

The relevant facts follow. On October 24, 2005, Gooldy pleaded guilty to operating a vehicle with drugs resulting in death as a class B felony and to being an habitual offender. On November 22, 2005, the trial court sentenced Gooldy to twenty years enhanced by twenty years for the habitual offender enhancement for a total sentence of forty years in the Indiana Department of Correction. On March 15, 2007, Gooldy filed a pro se petition for post-conviction relief, alleging that: 1) his guilty plea was not voluntary because the trial court did not advise him of the elements of the habitual offender enhancement; and 2) his trial counsel was ineffective for failing to object to the lack of sufficient evidence in support of the habitual offender finding. On March 29, 2007, Gooldy moved to have the guilty plea and sentencing transcripts forwarded to himself and the State. On August 21, 2007, the State filed its answer to Gooldy's petition.

On October 17, 2007, without holding a hearing, the post-conviction court issued an order denying Gooldy's petition for post-conviction relief as follows:

ORDER DENYING PETITION FOR POST-CONVICTION RELIEF

This cause having come before the court on [Gooldy's] Petition for Post-conviction Relief, and the Court, having reviewed said Motion and being duly advised in the premises, now **DENIES** the Motion.

I. Facts

On November 9, 2004, [Gooldy] operated a vehicle with a controlled substance in his system, resulting in the death of another person. [Gooldy] was convicted of a Class B Felony of Operation Vehicle with Drugs—Death, and was sentenced to 20 years imprisonment pursuant to a plea agreement. Additionally, the sentence was enhanced by an addition [sic] 20 year consecutive term because of [Gooldy's] status as a habitual offender. The enhancement was also levied pursuant to [Gooldy's] plea agreement.

II. Discussion

[Gooldy] alleges two grounds for post-conviction relief: 1) that his plea agreement was not entered into knowingly, intelligently and voluntarily; and 2) that he was denied the effective assistance of counsel. Each issue will be dealt with in turn.

[Gooldy] Entered Into His Plea Agreement Knowingly, Intelligently and Voluntarily

Plea agreements must be entered into knowingly, intelligently, and voluntarily. *Lee v. State*, 816 N.E.2d 35, 39 (Ind. 2004). The requirement of knowingly refers to a defendant's awareness of the charges against him and the rights given up by a guilty plea. *Patton v. State*, 810 N.E.2d 690, 692 (Ind. 2004); *Hall v. State*, 849 N.E.2d 466, 470 (Ind. 2006).

At his change of plea hearing, the court thoroughly explained to [Gooldy] the effect of a guilty plea and the terms of his plea agreement. Additionally, [Gooldy] signed a written plea agreement form. The court explained the charges against [Gooldy], the maximum penalties associated with those charges, the effect of the habitual offender enhancement, and the consecutive nature of the habitual offender sentence. After each item was explained, the court asked [Gooldy] if he understood. Each time, [Gooldy] answered in the affirmative.

Also at the change of plea hearing, the court explained to [Gooldy] his right to not plead guilty, and that he would be waiving his rights to trial by changing his plea. [Gooldy] was asked once more if he understood. He answered affirmatively.

[Gooldy] was asked if he had "substantial opportunity" to discuss his plea agreement with his attorney. He answered affirmatively. The court explained to [Gooldy] that he had a choice whether or not to accept

the plea agreement. [Gooldy] questioned a particular provision of the agreement, and after some explanation by the court indicated he was willing to accept the agreement as it was written. Additionally, [Gooldy] confirmed to the court that he was not forced, threatened, coerced, or improperly induced into accepting the agreement.

Finally, [Gooldy] confirmed to the court that on November 9, 2004, in Monroe County, he did operate a vehicle with a Schedule I or II Controlled Substance in his blood, and that he caused the death of another person.

From the record of this case, it is abundantly clear that [Gooldy] did plead guilty knowingly, intelligently, and voluntarily. He was aware of the charges against him, and aware of the rights given up by his guilty plea.

[Gooldy's] Counsel Effectively Assisted Him

In order to prevail on a claim of ineffective counsel, a defendant must show: 1) that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and 2) that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Nantz v. State*, 740 N.E.2d 1276, 1283 (Ind. Ct. App. 2001). The Indiana Supreme Court has held that counsel is given "significant deference" in choosing strategy and tactics which he or she deems best. *Wrinkles v. State*, 749 N.E.2d 1179, 1191 (Ind. 2001).

The record in this case shows that defense counsel actively and vigorously represented [Gooldy]. Counsel prepared a thorough defense and was ready to go to trial on the day the plea agreement was accepted. Counsel filed a motion to suppress, accompanied by a 10 page memorandum of law supporting the motion. Counsel also interviewed and deposed various witnesses.

Moreover, at the change of plea hearing, [Gooldy] was questioned by the court concerning the legal counsel he received. When asked if he believed he had been fairly represented, [Gooldy] responded affirmatively. [Gooldy] also indicated he was satisfied with the number of meetings he had with his attorney. Ultimately, when asked if he believed his attorney had done an adequate job of representing him, [Gooldy] responded affirmatively.

There is no indication that defense counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms. Moreover, there is no reason to believe that the actions of defense counsel in any way prejudiced the outcome against [Gooldy].

III. Conclusion

This court finds that [Gooldy] entered into his plea agreement aware of the charges against him, the penalties associated with those charges, the terms of his agreement, and the effect of the agreement upon his rights. He entered into the agreement knowingly, intelligently and voluntarily.

Additionally, this court finds that the legal counsel [Gooldy] received was professional, competent, and vigorous.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that [Gooldy's] Petition for Post-Conviction Relief be, and hereby is **DENIED**.

Appellant's Appendix at 21-23. Thus, the post-conviction court summarily denied Gooldy's petition for post conviction relief. Gooldy filed a motion to amend his petition, which the post-conviction court also denied.

The issue is whether the post-conviction court erred by summarily denying Gooldy's petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id.

Ind. Post-Conviction Rule 1(4)(f) provides: "If the pleadings conclusively show that petitioner is entitled to no relief, the court may deny the petition without further

proceedings.” “When a court disposes of a petition under subsection f, we essentially review the lower court’s decision as we would a motion for judgment on the pleadings.” Tyson v. State, 868 N.E.2d 855, 857 (Ind. Ct. App. 2007), trans. denied. “The court errs in disposing of a petition in this manner unless ‘the pleadings conclusively show that petitioner is entitled to no relief.’” Id. (citing Ind. Post-Conviction Rule 1(4)(f)). “If the petition alleges only errors of law, then the court may determine without a hearing whether the petitioner is entitled to relief on those questions.” Id. “However, if the facts pled raise an issue of possible merit, then the petition should not be disposed of under section 4(f).” Id. “This is true even though the petitioner has only a remote chance of establishing his claim.” Id. “[T]he trial court should accept the well-pled facts as true and determine whether the petition raises an issue of possible merit.” Id.

First, we note that, in determining that the trial court adequately explained the charges against Gooldy, the post-conviction court’s order relies on the transcript of his guilty plea hearing. However, in a post-conviction case, the post-conviction court cannot take judicial notice of the transcript of the evidence from the original proceedings absent exceptional circumstances; the transcript must be entered into evidence just as any other exhibit. Armstead v. State, 596 N.E.2d 291, 292 (Ind. Ct. App. 1992) (citing State v. Hicks, 525 N.E.2d 316, 317 (Ind. 1988); Moser v. State, 562 N.E.2d 1318, 1321 (Ind. Ct. App. 1990)). Thus, the post-conviction court erred by considering the transcript in summarily denying the petition.

Moreover, in examining only the pleadings, we note that Gooldy's petition alleged in part that he did not knowingly, voluntarily, and intelligently plead guilty to being an habitual offender because the trial court failed to advise him of the elements of that offense.¹ This factual allegation raises an issue of possible merit, and, thus, Gooldy's petition should not have been disposed of under Ind. Post-Conviction Rule 1(4)(f). See, e.g., id. at 293-294 (holding that an evidentiary hearing was required where defendant's claim that his plea was not knowingly and voluntarily made posed factual controversies); Hamner v. State, 739 N.E.2d 157, 160 (Ind. Ct. App. 2000) ("Consequently, in regard to Hamner's claim that his guilty plea was not knowingly, voluntarily, and intelligently entered, we find that there are facts not yet resolved.").

For the foregoing reasons, we reverse the post-conviction court's denial of Gooldy's petition for post-conviction relief and remand for an evidentiary hearing and further proceedings consistent with this opinion.

Reversed and remanded.

NAJAM, J. and DARDEN, J. concur

¹ Gooldy also argues that his trial counsel was ineffective. Because we remand for an evidentiary hearing, we do not address his argument.